Bank Utama (Malaysia) Bhd v Sistem BIS Komputer Sdn Bhd & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22-297-90
JAMES FOONG J
29 SEPTEMBER 1995

Civil Procedure *— Summary judgment and/or striking out — Application for — Election — Whether plaintiffs could still return and file fresh application under O 18 — Whether principle of approbation and reprobation estopped the plaintiffs — Whether exceptions applied — Whether there was delay in plaintiffs' application under O 18 — Rules of the High Court 1980 O 18*

The plaintiffs filed a writ of summons against the defendants. After the defendants had entered their statement of defence, the plaintiffs had made an application for an order to strike out the defence under O 18 r 19 Rules of the High Court 1980 (RHC) and/or for summary judgment under O 14 RHC.

At the time of hearing, the defendants insisted on the plaintiffs making an election either to proceed with the striking out or the summary judgment. The plaintiffs elected the summary judgment and the registrar struck out the first prayer of the plaintiffs' application for striking out. The plaintiffs' application for summary judgment was dismissed. The plaintiffs then commenced a fresh application for striking out. The defendants raised a preliminary objection that by the principle of approbation and reprobation, the plaintiffs were estopped from proceeding with this application and that secondly, the plaintiffs had delayed in making this application.

Held, dismissing the application:

(1) In an application for summary judgment by the plaintiff made together or in the alternative in the nature of an O 14 and/or O 18 RHC, an election had to be made by the plaintiff as to which of the two he preferred to proceed upon. There could not be a hearing of both applications at the same time.

(2) The principle of approbation and reprobation did not apply where the two claims were not inconsistent and the circumstances did not show an intention to abandon one of them. Abandonment in this context had to connote some form of positive action or expression of giving up or yielding completely coupled with an intention not to revert back to exercise it again.

(3) The principles for an application for summary judgment were different from those for an application for striking out. They were not inconsistent and qualified the first condition of the exception.

(4) The plaintiffs had not actually abandoned their application for striking out at the time of election but had only withdrawn it temporarily. The withdrawal did not act as a prevention to the plaintiffs from filing a fresh O 18 application.

(5) The plaintiffs did not refile their application under O 18 until two and a half years later. Such delay was fatal in an application of striking out.

[Bahasa Malaysia summary

Plaintif telah memfailkan satu writ saman terhadap defendan. Selepas defendan memasukkan pembelaan mereka, plaintif pun membuat satu permohonan untuk perintah membatalkan pembelaan itu di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau untuk penghakiman terus di bawah A 14 KMT.

Di pembicaraan, defendan mendesak plaintif membuat satu pilihan sama ada untuk meneruskan dengan pembatalan atau pun penghakiman terus. Plaintif memilih penghakiman terus dan pendaftar pun membatalkan permohonan pertama dalam permohonan plaintif untuk pembatalan. Permohonan plaintif untuk penghakiman terus kemudiannya telah ditolak. Plaintif seterusnya memulakan satu permohonan baru untuk pembatalan. Defendan menimbulkan bantahan permulaan bahawa mengikut prinsip 'approbation and reprobation', plaintif diestop daripada meneruskan permohonan itu. Tambahan pula, plaintif telah melengahkan masa dalam membuat permohonan itu.

Diputuskan, menolak permohonan itu:

(1) Dalam suatu permohonan untuk penghakiman terus oleh seorang plaintif yang dibuat bersama dengan atau secara alternatif dalam rupa satu permohonan A 14 dan/atu A 18 KMT, satu pilihan mesti dibuat oleh plaintif tentang mana daripada kedua-dua permohonan itu yang beliau ingin teruskan. Tidak boleh diadakan pembicaraan kedua-dua permohonan itu pada masa yang sama.

(2) Prinsip 'approbation and reprobation' tidak terpakai di mana kedua-dua tuntutan itu tidak bertentangan dan keadaan kes tidak menunjukkan niat untuk meninggalkan satu daripadanya. Peninggalan dalam konteks ini mesti membayangkan satu bentuk tindakan atau pengataan positif melepaskan sepenuhnya tuntutan itu bersama dengan satu niat tidak akan berpusing balik untuk melaksanakannya semula.

(3) Prinsip-prinsip untuk satu permohonan untuk penghakiman terus adalah berbeza daripada prinsip-prinsip untuk pembatalan. Mereka tidak bertentangan dan membuat kualifikasi kepada syarat pertama kecualian itu.

(4) Plaintif sebenarnya tidak meninggalkan permohonan mereka untuk pembatalan pada masa mereka membuat pilihan tetapi

telah menarik balik permohonan itu buat sementara waktu. Penarikan balik itu tidak bertindak untuk mencegah plaintif daripada memfailkan satu permohonan A 18 yang baru.

(5) Plaintif tidak memfailkan semula permohonan mereka di bawah A 18 sehingga dua setengah tahun selepas itu. Kelengahan sebegitu cukup untuk menggagalkan satu permohonan untuk pembatalan.]

Notes

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520; [1991] *Mallal's Digest* paras 450–458; [1994] *Mallal's Digest* paras 493–498.

Cases referred to

Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd [1988] 2 CLJ 861 (folld)
Mohd Azam Shuja & Ors v UMBC [1995] 3 AMR 2175 (folld)
Tucker v Collinson (1886) 34 WR 354 (folld)
Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 (folld)

Legislation referred to

Rules of High Court 1980 O 14(1), (2), 18 r 19(1)

Chang Wei Mun (*Raja Darryl & Loh*) for the plaintiffs.
S Sivareindiren (*Cheah Teh Su*) for the defendants.

James Foong J: This is an application (encl 60) by the plaintiffs under O 18 r 19(1) of the Rules of the High Court 1980 (RHC) to strike out the defence of the defendants.

A preliminary objection is raised by the defendants' counsel based on the following grounds:

(1) by the principle of approbation and reprobation, the plaintiffs are estopped from proceeding with this application and;

(2) the plaintiffs have delayed in making this application.

In order to decide on this issue, a brief outline of the history of this case is necessary.

On 21 September 1990, the plaintiffs filed a writ of summons against the defendants which led to the defendants entering their statement of defence. On 9 January 1991, an application (encl 7) was filed by the plaintiffs for:

(a) an order to strike out the defendants' defence under O 18 r 19 RHC 'and/or';

(b) for summary judgment against the defendants under O 14 RHC.

When this application came up for hearing before the Senior Assistant Registrar (SAR) in the High Court at Shah Alam, the defendants' counsel insisted on the plaintiffs making an election either to proceed under O 18 r 19 RHC or under O 14 RHC. This approach was accepted by the SAR who relied basically on the High Court authority in *Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861. Upon this, the plaintiffs' counsel elected to proceed with his application under O 14 RHC whereupon the SAR struck out the first prayer of the plaintiffs' application for O 18 RHC.

The application of the plaintiffs under O 14 was duly heard, but was dismissed by the SAR based on technical ground where the plaintiffs had erroneously inserted in their application O 14(1) instead of O 14(2) RHC.

A fresh application under O 14(2) RHC was filed by the plaintiffs but after being heard by the SAR was duly dismissed. Dissatisfied with this, an appeal was lodged to the judge of the High Court but unfortunately it was filed out of time, consequently this appeal was dismissed.

Obviously believing strongly that they have good grounds to support a summary judgment, the plaintiffs filed once again this fresh application under O 18 r 19(1) RHC. This drew strong preliminary objection from the defendants on the grounds as stated above.

Subsequent to the High Court decision in *Wagon Engineering Sdn Bhd's* case, the Court of Appeal in *Mohd Azam Shuja & Ors v UMBC* [1995] 3 AMR 2175, have authoritatively affirmed that in an application for summary judgment by the plaintiff made together or in the alternative in the nature of an O 14 and/or O 18 RHC, an election must be made by the plaintiff as to which of the two he prefers to proceed upon; there cannot be a hearing of both applications at the same time. (Though *Mohd Azam*'s case involves applications made under O 26A and O 14 r 21 of the Subordinate Courts Rules, such applications are virtually identical to O 14 and O 18 r 19 RHC.) From the facts of this instant case, the plaintiffs had elected O 14 RHC, but when they failed can they still return and file a fresh application under O 18 RHC?

It is the defendants' contention that the plaintiffs are estopped under the principle of approbation and reprobation. According to 16 *Halsbury's Laws of England* (4th Ed, Rep) at para 957, this principle expresses two propositions:

(1) firstly, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and

(2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

Judging from the facts that had transpired, it leaves little doubt that this principle of approbation and reprobation is applicable in this instant

A case. Though the plaintiffs' counsel has seemingly agreed that these propositions do apply, but he contented that this rule of election;

> does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them.

B This exception is cited from a passage in 16 *Halsbury's Laws of England* (4th Ed, Rep) para 957. To support his claim, plaintiffs' counsel drew the court's attention to the difference in nature between an O 14 RHC application and that of O 18 RHC. He then proceeded to inform the court that the plaintiffs did not actually abandon their claim under O 18 RHC at the time of election; the plaintiffs only withdrew their C application under O 18 RHC temporarily, except the SAR had made an entry that it was struck off. This withdrawal should not act as a prevention to the plaintiffs from filing a fresh O 18 RHC application.

This court agrees that by nature an application under O 18 RHC differs from that of O 14 RHC. Order 18 RHC is a regulation that D enforces the rules of pleadings. If the pleadings, as in this case the defence, is found to contain no reasonable defence or is scandalous, frivolous or vexatious, or prejudice, embarrass or delay the fair trial of the action, or otherwise an abuse of the process of the court, then it may be ordered to be struck off, and judgment entered accordingly. The test to be applied here centres upon the pleadings itself, and before E it can be struck off the above principles must be satisfied in line with established authorities.

On the other hand, in respect of an O 14 RHC application, the test is not so much centred on the pleadings, but on facts revealed from the testimonies affirmed on affidavits of the parties which show that;

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> There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to expense, and where it is not in aid of justice that such things should continue, Order 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to the plaintiffs who were G endeavouring to enforce their rights — Per Halsbury LC in *Jacobs v Booth Distillery Co* (1901) 85 LT 262 HL.

Under such a claim for summary judgment, the facts of the case rather than the pleadings are more essential. Here, the concentration is on the facts and it must reveal a virtually uncontested or uncontestable case H where the defence was filed simply for the purpose of delay.

A comparison of two different principles to be applied will expose distinction between the two claims (under O 14 and O 18) making them not inconsistent, thus qualifying the first condition of the exception.

As for the second condition, the plaintiffs must satisfy this court I that in the circumstances of this case, at the time when the election was made, the plaintiffs had not shown an intention that they were abandoning the O 18 RHC application. From the notes recorded by the SAR, when an election to proceed with either an O 14 RHC or O 18 RHC was requested, the plaintiffs' counsel merely stated that he selects

to proceed under O 14 RHC, thereupon the SAR proceeded to strike off the O 18 RHC application. In the opinion of this court, the action of the plaintiffs' counsel did not amount to an abandonment of his claim. He made a selection but not an abandonment of one for the other. Abandonment in the context of this exception must connote some form of positive action or expression of giving up or yielding completely and finally, couple with the intention of never to revert back to exercise it again. There was no application to withdraw the O 18 RHC application nor could the action of forced selection be considered as an act or intention of abandonment. The action of the plaintiffs is more akin to a desire to withdraw temporarily leaving an option to proceed at a subsequent date. Under such circumstances, this court finds the plaintiffs have also satisfied the second condition to the exception of the rule approbation and reprobation thereby causing estoppel to have no application here.

The final issue to be settled is that of the allegation of delay on the part of the plaintiffs in bringing this O 18 RHC application.

The plaintiffs argued that the delay, if any, was due to the election to proceed with O 14 RHC application first. Until this was settled they are of the view that no further steps towards the direction of O 18 RHC should be recommenced. Since the O 14 RHC application was finally determined by the refusal of their appeal to the judge of the High Court recently, they have wasted no time in instituting this application.

As elaborated earlier, an O 18 RHC application is entirely different and apart by nature to that of O 14 RHC, though one must admit that in most times the end result may be similar. When an election was made by the plaintiffs to proceed with O 14 RHC leading to their application under O 18 RHC being struck off, there is nothing to prevent the plaintiffs from making a fresh application against the defendants under the latter rule. Similarly as the two applications (O 14 and O 18 RHC) are separate and distinct remedies, the plaintiffs too could have filed different applications in separate forms seeking the respective reliefs. In short, an O 14 RHC application should not prevent a separate application under O 18 RHC from being filed and vice versa. What is prohibited under the authority of *Mohd Azam Shuja*'s case is that if one seeks both these reliefs in one application, then an election must be made to proceed on either one. In the circumstance of this instant case, the plaintiffs did not refile their application under O 18 RHC soon after the election, causing a delay of almost 2½ years. Such delay is fatal in an application of this nature, as is well established by the case of *Tucker v Collinson* 34 WR 354, as well as the recent High Court decision in *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83. For this reason, this court rules that the plaintiffs' application in (encl 60) be dismissed with cost.

Application dismissed.

Reported by Victor T Gidwani